Rules, Rules, Rules!
The Lawyer as a Third-Party Neutral
by Joan D. Hogarth

“Live one day at a time emphasizing ethics rather than rules.”—Wayne Dyer

“A lawyer is also guided by personal conscience and the approbation of professional peers....”

The preamble of the ABA Model Rules of Professional Conduct states:

Alternative dispute resolution (ADR) is practiced and used by lawyers and nonlawyers alike. Court-annexed programs are becoming increasingly popular where the lawyer finds herself in an advantageous position to serve as a third-party neutral at any stage of the litigation life cycle. In these instances, the lawyer, as a third-party neutral, is held to a higher standard in light of the lawyer's position as an officer of the court. And because ADR has become such an integral part of the way in which disputes are resolved, rules have been established to govern processes such as facilitation, mediation, neutral evaluation and arbitration, and the behavior of those lawyers who are serving in nonlegal roles.

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them ... the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

The lawyer is reminded that he or she wears two hats as a third-party neutral—a lawyer and an ADR practitioner. As a third-party neutral, the lawyer is no longer the captain of the ship, rather, he or she serves at the will of the parties. The parties choose to participate in the process, they choose the third-party neutral, and they establish the rules of participation. The parties determine the rate of progress and the outcome of the facilitated negotiation in mediation. It is the lawyer's duty to both recognize the new role he or she plays as a third-party neutral, and his duty to distinguish the roles. This is to protect the integrity of the ADR process and, quite frankly, the lawyer's reputation. Whereas Rule 2.4(b) refers to the instances where there are “unrepresented parties,” ADR rules from courts and bar associations indicate that the duty is applicable to all parties in the process—represented or not. The underlying intent is to build and sustain confidence in the process even as ADR has had its share of detractors.

This month's column highlights some of the common rules across the ADR community to which the lawyer third-party neutral should comply. To address the various interpretations, conundrums, or dilemmas associated with these rules, in practice, I invite you to participate in online forums, read blogs, or attend ethics CLE classes.

Ethical Codes of Conduct for Arbitrators and Mediators

It is recognized that ADR should be fair and the persons engaged as neutral third parties should be people of integrity and good character. The significant rules are fairness in the process, impartiality, duty to disclose conflicts of interest, confidentiality, and competence.

Fairness and Integrity of the Process

The lawyer is obligated to inform the parties of the ADR options for resolving disputes. The lawyer, serving as a third-party neutral, needs to make “reasonable efforts” to ensure that the parties and their counsel understand the ADR proceedings and that they know-
ingly consent to proceed. This should be done at the pre-hearing or pre-mediation discussions as well as repeated at the start of the session. The lawyer third-party neutral must state that he or she does not represent any of the parties and will not give legal advice.

Impartiality

Impartiality indicates that the third party neutral is free from bias and favoritism in word, action, or appearance, and is committed to assist all parties in the process (i.e., not favoring one over the other). Impartiality applies to the parties and to the subject matter. For example, in mediation, the lawyer third-party neutral should not give legal advice to an unrepresented claimant in an insurance case even as the insurance company has legal representation. It may be tempting to try to “level the playing field” to ensure a fair process. However, unless the local court rules allow for providing legal advice, such behavior would reflect partiality to one party over the other.

The simple appearance of partiality could lead to (1) failure in mediation negotiations or, (2) the losing party in arbitration seeking to vacate an arbitral award under the narrow exception afforded by the Federal Arbitration Act.8

“The evident partiality” is that exception under the act that has served as the basis for those challenges. The losing party claims bias, evidenced by the arbitrator’s actual act or circumstantial association, from which it could be implied that there is a potential for bias. Partiality is evidenced by ex parte discussions between the arbitrator and any of the parties in the absence of the other where the third-party neutral fails to disclose conflicts—real or perceived—or where the third-party neutral may have associated with counsel representing the parties through Twitter, LinkedIn, or bar/trade associations. Note that in mediation, such ex parte discussions serve as the basis for trust-building and is encouraged.

Duty to Disclose Conflicts of Interest

In order to fairly conduct an arbitration or mediation, the lawyer third-party neutral must determine if he or she has a personal, financial, or business interest in the outcome of the matter and if it would be wise to continue; and if there are relationships with the parties that could give the appearance of such interest. This is also an ongoing requirement throughout the process. It is ill-advised for the lawyer who acted as a third-party neutral to accept an engagement to represent one of the parties in litigation on the same matter. For example, a mediation result not in an agreement, and the parties continue to litigation, the rules discourage the third-party lawyer from being the legal representative, where information gathered during mediation could be used against the opposing party.

Confidentiality

The third-party neutral should make it a practice, at the first available opportunity—such as during pre-mediation or pre-hearing conferences—to inform the parties of the confidentiality requirements, except where court rules state otherwise. The decision to participate in ADR, particularly mediation, is the promise of confidentiality. The third-party neutral shall at all times refrain from discussing the details of the case outside of the process. Should a lawyer third-party neutral share details of the mediation with the judge who ordered the mediation? The parties and their counsel may violate the rule at their own risk. The answer for the lawyer may be more complex. Certainly when a party challenges an arbitral award or tries to confirm a mediation settlement agreement in the courts, the confidentiality may disappear.

Competence

Model Rule 4.5.1 states:

A lawyer serving as a third-party neutral shall act diligently, efficiently and promptly, subject to the standard of care owed the parties as required by applicable law or contract. (b) A lawyer serving as a third-party neutral shall decline to serve in those matters in which the lawyer is not competent to serve.9

At minimum, the lawyer third-party neutral must have ongoing education and awareness of the ADR processes, local rules that govern them, and in some jurisdictions, certification requirements. Competence also covers knowledge of the technical subject matter, cultural nuances, and ethical requirements.

This rule also refers to the ability of the lawyer as the third-party neutral, to efficiently and timely resolve the dispute. ADR is promoted as an efficient process and thus if the lawyer third-party neutral cannot meet the requirements of this rule, he or she should decline the assignment. Further, if the subject matter is beyond the lawyer’s competence, he or she should decline.

It is worth noting here that efficient and prompt resolution is not to the exclusion of fairness. In achieving the results, particularly in the facilitated negotiations, the third-party neutral would not coerce an agreement and in arbitration the third-party neutral is expected to “decide all matters justly, exercising independent judgement, without permitting outside pressure to affect the decision.”

Conclusion

The lawyer knows and understands the rules of professional conduct because they have been so ingrained in his legal practice. He is also aware of the obligations of other lawyers to report him should he violate the rules. If the lawyer wishes to act as an ADR third-party neutral, there are even more rules to follow. Yet, it is not the plethora of rules which the lawyer must be concerned in ADR. It is the fairness of the process and the manner in which the lawyer conducts himself throughout that will ensure that the lawyer will maintain his reputation as a third-party neutral and will ensure that the ADR process is sustained. The rules are simply there to guide. ○

Endnotes

1 For this column, I have relied on the various model rules that are available on a national scale and those that are available for local jurisdictions, such as the Florida courts. Other rules referred to include CPR International Institute for Conflict Prevention and Resolution’s Model Rule for The Lawyer as Third-Party Neutral. CPR-Georgetown Comm’n On Ethics & Standards in ADR, Model Rule for the Lawyer as Third-Party Neutral (Nov. 2002) [hereinafter CPR Model Rule], [https://www.cpradr.org/resource-center/protocols-guidelines/ethics-codes/model-rule-for-the-lawyer-as-third-party-neutral_res/ id=Attachments/index=0/Third-Party-netural-create-new-cover-page-2012.pdf].

2 Model Rules of Prof’l Conduct r. 2.4 (Am. Bar Ass’n 2016).

3 Id.

4 See, e.g., Jessica Silver-Greenberg & Robert Gebeloff, Arbitration

continued on page 77
900 (Bankr. S.D. Fla. 2010) was “4 times the amount invested plus 1 percent of the … claims”) (internal citations omitted).

The lawyer third-party neutral should also participate in, court-ordered mediations. The lawyer third-party neutral should also visit the ABA ADR Ethics Resources page for examples of ethical dilemmas. ADR Ethics Resources, A.B.A., https://www.americanbar.org/groups/dispute_resolution/resources/Ethics.html (last visited Sept. 21, 2018).


9CPR Model Rule r. 4.5.1: Diligence and Competence.

Id. (“[T]he transactions at issue in this case … are different from … Revenue Ruling 2003-7”). The result of these related transactions was that DLJ obtained possession, and most of the incidents of ownership, of TAC’s pledged shares. TAC, in turn, obtained cash payments and an elimination of any risk of loss in the pledged stock’s value at the end of the term of the transactions.”).

See Robert W. Wood, Prepaid Forward Contracts Are not All Bad, 135 Tax Notes Today 365, 367 (Apr. 16, 2012) (defining the funding in terms of delivering a “portion of a claim” not the “rights to recovery”).

Id. at 368 (“[Variable Prepaid Forward Contracts] that stick closely to the pattern set out in Rev. Rul. 2003-7 and that do not involve a transfer or loan of the underlying property to the counterparty, should still be on solid ground.”).

See supra part II.

148 T.C. No. 13.


See id. (citing Burnet, 283 U.S. at 413-14) (“[T]he taxpayer first applies any payments received to his or her basis. Once they have recovered their basis, they report any additional payments as income.”).

See Tribune Pubs. Co. v. United States, 836 F.2d 1176, 1180 (9th Cir. 1988) (holding that a taxpayer cannot apply the open transaction simply because the amount of profit was unknown “because we read Burnet to apply only if there is uncertainty as to whether the taxpayer will realize a profit from the transaction at issue”).

See id. at *12; see also Treas. Reg. § 1.1001-1(g)(2)(ii).